IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 530 of 1996

with

CRIMINAL APPEAL No 571 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HITESH THAKOREPRASAD VYAS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 530 of 1996
   MR AD SHAH for Appellant No.
   MR KC SHAH, APP for Respondent No. 1
2. Criminal Appeal No. 571 of 1996
   MR KC SHAH, APP for Appellant No.
   MR AD SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 27/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. Original accused no. 1 - Hitesh Thakorprasad Vyas of Sessions Case No. 88 of 1994 of the Court of Ld. Addl. Sessions Judge at Jamnagar has preferred Criminal Appeal No. 530 of 1996 before this Court to challenge his conviction under section 302 of the Indian Penal Code [for short 'IPC'] and order of sentence of rigorous imprisonment [RI] for life and to pay fine of Rs.2,000/- in default RI for two years. The State of Gujarat has preferred Criminal Appeal No. 571 of 1996 to challenge the judgment and order of acquittal passed in favour of original accused no. 2 in the said Sessions Case. Since both these appeals arise from the same judgment and we have heard them together, we now dispose them of by this common judgment. For the purpose of convenience, the appellant of Criminal Appeal No. 530 of 1996 and the respondent of Criminal Appeal No. 571 of 1996 are referred to in this judgment by their original position in the trial Court. The date of the impugned judgment is 25th May, 1996.

2. It is the case of the prosecution that deceased Keyur was the son of Prosecution Witnesses (PWs) Sarojben and Thakorprasad Vyas. Sarojben was living with Thakorprasad as his wife, though they were not legally married. The first wife of Thakorprasad, namely Dhirajben, who is accused no. 2, was married to him in the year 1958. During their marriage life, they had three sons, namely Dhimant, who at the relevant time was staying in Africa, Bharat, who was serving at Baroda and the youngest one i.e. Hitesh, who was serving in Sarvoday Engineering in K.J. Patel Colony at Jamnagar. Prior to 1988 Thakorprasad [for short 'PW 5'] was working as Assistant Taluka Development Officer in the District Panchayat. In the month of May 1988 he took voluntary retirement. He thereafter, started legal practice at Jodiya, near Jamnagar. His relations with PW Sarojben had resulted into birth of two children, namely daughter Kinjal and son Keyur, aged 13 and 10 years respectively at the time of incident. Keyur is the deceased in the present case.

2.1. It is the case of the prosecution that the accused did not like relations of PW 5 with Sarojben and their two children. They, however, did not bother for the same and the accused resided separately. It is the case of the prosecution that so far accused no. 1 is concerned, he often approached PW 5 and demanded money under various pretext. PW 5 sometimes gave the amount and some times refused to give. It appears that this process was going on since long. It also appears from the record that according to the prosecution, PW 5 whenever came to Jamnagar from Jodiya, he did not go to the place of accused, but stayed with Sarojben [for short 'PW 1'] and their two children. It also transpires that PW 1 was serving in the school and Kinjal was studying in Vikas Grah School in Standard VI. The deceased was also studying in the school. His school hours were from 7.00 a.m. to 12.15 noon; whereas PW 1 and Kinjal attended schools in the afternoon. Thus, Keyur remained all alone after he came from the school till 3.30 p.m. when he was required to go for tuition to the place of one Jyotsanaben. It is also the case of the prosecution that key of the house was kept at the place of tenant of Sarojben and as and when the deceased returned home he collected key from the tenant and opened the door. The parents had strictly instructed the children that they should not open the door even if persons known to them came to their house and the house was to be kept locked from inside. Ofcourse, certain exceptions were made and they were asked to open the door if accused no. 1 visited the place.

2.2. It is the case of the prosecution that on 18th April, 1994 around 6.00 to 6.30 p.m. accused no. 1 approached PW 5 and demanded money from him saying that next day he was going to Bombay to purchase about 10 to 12 pairs of white shoes since he had received order for the same. It also transpires that at that time there was some discussion with regard to business to be done by accused no. 1 and PW 5 had offered to lend him necessary assistance provided he agreed to his suggestion. That was not acceptable to accused no. 1. He, however, insisted that PW 5 should give him the money and some premises to be used as business place. PW 5 refused to do so saying that if everything was given away to accused no. 1, nothing would be left for Keyur, the deceased. Accused no. 1 has thereafter left the place.

2.3. According to the prosecution, on 19th April, 1994 when PW 1 returned home she saw her daughter Kinjal standing near the house. She, therefore, inquired why she was standing there and where was Keyur. She gave

a reply that Keyur was not to be seen. PW 1, therefore, asked Kinjal to make inquiry in the neighbourhood and accordingly Kinjal made the inquiry and came back and reported that Keyur was not to be found. PW 1, therefore, asked Kinjal to climb the grill and enter the room from a small opening, which was there between the main door and the grill. Kinjal went inside and gave one key which was kept in the house in the kitchen to her mother PW 1, who opened the door. Keyur was not to be seen in the room, but they found blood on the floor. Thereafter they went in the second room, there also Keyur was not there but the floor was smeared with blood all over and an effort to wipe it was made. Ultimately when the toilet was opened, they found the dead body of Keyur, whose head was hanging in the open space in the commode and his legs were towards the door. His mouth was gagged with the under garment of Kinjal and on the lower part of his body a towel was spread. The mother and daughter having seen this ghastly scene, raised hue and cry, as a result of which people gathered there. PW 5 was contacted by one Yogesh, son of advocate BP Tanna, who informed that the condition of Keyur was very serious and he should immediately rush down. He, therefore, arrived there and learnt about the incident. Police Inspector attached to Jamnagar "B" Division Police Station received message that there was a murder of 10 to 12 years' boy residing in Patel Colony. He, therefore, came to the police station and tried to receive some more information from the Police Station Officer. He informed the Police Inspector that an anonymous message was received on control. The Police Inspector thereafter proceeded to the place of incident and recorded the FIR given by PW 1. The said FIR was forwarded to the police station with Yadi Exh. 57 for being entered into the station diary for registration of the offence. In the FIR no name has been given by PW 1.

2.4. After registration of the offence, Police Inspector commenced usual investigation and recorded the statements of PW 1, PWs 5 and 13. He also summoned dog squad. The dog was given the smell of the culprit from the towel covered on the body of Keyur. The dog made the tracing up to the house of accused, which was found to be closed at that time. It is further the case of the prosecution that inquiry was made with regard to whereabouts of the accused, but it was without any success. Ultimately, it was decided to keep watch on the house. On 23rd April, 1994 accused no. 2 was reported to be seen near the house and hence Police Inspector went there and found her in the house. He, therefore, interrogated her and recorded her statement. She had

produced clothes of accused no. 1. They were washed. She had also on 29th April, 1994, while she was already arrested for offence under section 201 of the IPC, shown willingness to point out the knife. Hence, the preliminary panchnama was made and in the presence of the panchas she led them to the place near State Insurance Dispensary on Stree Vikas Gruh Road and from there to a shrub of babul tree. There was a stone, under which the blood stained knife with cover was lying. All these were seized by the police.

2.5. On 26th May, 1994 accused no. 1 was produced before the Police Inspector by Police Sub Inspector Vyas, who had apprehended him in the Jamnagar city itself. He was duly arrested and during his remand it was learnt that he had gone away to Bombay and served there at various places. According to the prosecution, he was taken to Bombay and identified by the persons with whom he served by giving false name.

2.6. Upon completion of the investigation charge-sheet was submitted against accused no. 1 and accused no. 2 under sections 302, 201 and 114 of the IPC. It was submitted in the Court of the Ld. Judicial Magistrate First Class, who in turn committed the case to the Court of Sessions since the offence under section 302 is exclusively triable by the Court of Sessions.

3. At the trial, the Ld. Addl. Sessions Judge, Jamnagar, framed charge against both the accused at Exh. 2 on 29th December, 1995. The accused pleaded not guilty to it and claimed to be tried.

3.1. At the trial the prosecution examined 20 witnesses and also produced documentary evidence to substantiate its case against the accused. After recording of the evidence further statement of the accused was recorded under section 313 of the Cr.P.C. Their defence appears to be that they have been falsely implicated in the present case due to suspicion. At the end of the trial, the learned Judge convicted the accused no. 1 for offence under section 302 of the IPC and imposed aforesaid sentence; whereas accused no. 2 was acquitted of all charges levelled against her.

4. Mr. AD Shah, learned advocate appearing for the appellant has submitted that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt. He, therefore, deserves to be acquitted. He has further submitted that the case of the prosecution rests solely on the circumstantial evidence

and the circumstances on record are not conclusively proved either individually or collective to point to only one hypothesis, namely the guilt of accused no. 1. He has submitted that merely because father of the accused no. 1 had contracted second marriage with the mother of the deceased, it would not be a motive for accused no. 1 to commit this crime, especially when the event of second marriage has taken place about 15 years prior to the present incident. He has also submitted that the evidence of PW 5 is full of improvements and the same cannot be utilized or relied upon for drawing the conclusion with regard to the motive. Lastly, he has submitted that the appellant even otherwise was to go to Bombay in a day or two after he last met PW 5 and, therefore, it cannot be said that he was absconding after the incident.

4.1. As against that, Mr. KC Shah, Ld. APP has supported the judgment of the trial Court. He has submitted that though the case is based on circumstantial evidence, the prosecution has been successful enough to establish the guilt of accused no. 1 beyond any reasonable doubt. According to him, there is no merit in this appeal and it deserves to be dismissed.

5. We have carefully gone through the evidence with a view to reappreciate it and we have also carefully considered the submissions advanced by both the sides.

5.1. It appears from the record that accused no. 1 is the son of PW 5 and his first wife i.e. accused no. 2. The first marriage of PW 5 and original accused no. 2 had taken place in the year 1958 and three sons were born to them, the accused no. 1 being the youngest one. PW 5 in his evidence has stated this fact. He has further stated that initially he was working as Assistant Taluka Development Officer in the office of the District Panchayat. However, in the month of May 1988 he had sought voluntary retirement and had started legal practice. He has further stated that from his first marriage he had three sons, namely Dhimant, Bharat and Hitesh. At the relevant time Dhimant was staying in Africa, whereas Bharat was doing job in Vadodara and Hitesh i.e. the present accused no. 1 was in the employment of Sarvoday Engineering Co. He has further stated that he was staying with Sarojben i.e. PW 1 as her husband and they had two children, namely PW 2 - Kinjal and son Keyur, who is deceased of the present case. At the time when the incident took place, Keyur was 10 years old.

5.2. It is further stated by PW 5 that on 18/4/1994 while the witness was in Jodiya where he was practicing, at about 6.00 to 6.30 p.m. his son Hitesh i.e. accused no. 1 met him and told him that he was to go to Bombay as he had received order for 10 to 12 pairs of white shoes and they were to be purchased from Bombay by him. It is further stated that the witness advised him not to go to Bombay for purchase of shoes as it would not be a remunerative proposition. However, he should start the business of cutlery and the witness would help him in opening a shop in the premises having a room on the ground floor. The said premises were in the name of the witness. Accused no. 1 did not agree to that and demanded money for purchase of shoes. PW 5, however, turned down his request saying that he had to think of Keyur also. Accused no. 1 at that time told the witness that first he should pay him and thereafter he should think of making arrangement for Keyur. He further told the witness that he should transfer the shop near Brahman Boarding institute to his name, which was then running in the name of the witness. The witness declined to do so. He further stated that if accused no. 1 did not wish to do any business, he would not part with any of the shops running in his name and that the same would be used by the witness himself and his son Keyur. Accused no. 1 did not like it and he, therefore, went away from there. Witness has further stated that on 19/4/1994 while he was near railway station, he was contacted by Yogesh, son of advocate BP Tanna, who informed him that his son Keyur was in a critical condition and he should reach there immediately. The witness reached Jamnagar around 8.30 p.m. and went to his house where he saw a crowd of about 500 to 1,000 persons. When he contacted PWs 1 and 2, they started crying and PW 1 informed him that somebody had committed murder of Keyur. PW 5 saw that dead body of his son was lying in the bath room. The witness has also stated that police had recorded his statement on two occasions. On 24th he came to know that his son Hitesh had committed murder of his son Keyur and Hitesh had been absconding. In the cross-examination of the defence, this witness has been confronted with his police statement to bring on record certain omissions which were though stated in the evidence not stated before the police while the matter was being investigated. From his cross-examination it also transpires that the accused no. 1 did not approve of his relations with PW 1 and with original accused no. 2 and even not gone to the house of PW 1. He has stated in the cross-examination that appellant and original accused no. 2 and PW 1 and their children, namely Kinjal and the deceased never had

resided together at any time. In other words, according to the witness, the original accused no. 2 and her children were not maintaining any relations with PW 1 and her two children. Nothing much is to be found from the cross-examination of this witness which can be taken into consideration for deciding the appeal.

5.3. PW 1 is the second wife of PW 5. Her evidence is recorded at Exh. 11. She admits her relations with PW 5 and two children having born to her on account of this relationship. She has also admitted that she and PW 5 were staying together as husband and wife. According to her, deceased used to go to school in the morning at about 7.00 to 7.15 p.m. She was also serving in the school and her time to leave the house was 11.30 a.m. She has further stated that on the day of incident she had left for the school in a rickshaw as it had got late. When she returned, she saw PW 2 i.e. her daughter Kinjal standing outside the house. The PW 1, therefore, asked Kinjal where was Keyur and she replied that he was not to be seen anywhere. Search was made by Kinjal for Keyur in the neighbourhood but she was not able to locate him anywhere. Ultimately she was made to climb the grill and she entered the house from a small opening and she collected the key from inside and opened the lock. PW 1 and others entered the house and looked for Keyur. Subsequently his body was found from the bathroom. She has further stated that it was the practice adopted by the family that whenever the deceased went the school and the witness was required to go to school in the afternoon, duplicate key was kept hidden in the kitchen. With the aid of this key the door was opened. The witness entered the house and started looking for the deceased. Ultimately his body was found from the lavatory. She has further stated that the accused no. 1 used to demand money from PW 5 and whenever he declined to give, he used to quarrel with him. In the cross-examination by the defence she has stated that she had not seen the accused no. 1 after the incident. She has further stated that the mouth of Keyur was gagged by inserting undergarment of Kinjal and dead body of the Keyur was lying on the floor of the bathroom. This witness has given the FIR. In the cross-examination she has admitted that she had not stated before the police that she used to hide second key in the kitchen. Her evidence does not throw much light on the case of the prosecution with regard to motive, etc.

5.4. PW 2 - Kinjal T. Vyas is the daughter of PW 1 and PW 5. She is older than the deceased. According to her, at the relevant time, she had gone to

the school and when she returned, the house was locked and despite efforts Keyur had not opened it. When her mother arrived there, she immediately told her mother about the missing of deceased and thereafter she managed to enter the house and opened the door with duplicate key. Her evidence is almost on the same line i.e. on the line of PW 1 and the same is, therefore, not reproduced her in detail.

5.5. Medical evidence is produced in the form of deposition of PW 3 Dr. Satish Dinkarray Kalele at Exh. 76 and also the evidence of PW 19 - Dr. Hasmukh Lalchand Shah at Exh. 75 and the post mortem notes. The evidence of these witnesses clearly shows that Keyur had died homicidal death. Their evidence is in consonance with the oral evidence. The deceased seems to have received injuries with knife and several injuries have been caused to him resulting into almost instantaneous death. Thus, the prosecution has been able to establish that it is homicidal death.

5.6. So far other evidence which would connect accused no. 1 with the crime is concerned, it is unimpeachable. It may be noted here that the prosecution had examined the dog handler, who had handled the dog which was brought on the spot to have the smell of the assailant and to locate him. The dog led the police to the house where accused no. 1 and accused no. 2 stayed. However, it is submitted by Mr. AD Shah that the well established law is that the evidence of dog squad cannot be accepted. He has also submitted that the trial Court has largely relied on the evidence of the dog handler and the panchnama regarding exercise carried out by the dog. PW 4 - Jesingbhai Pratapbhai has deposed at Exh. 19 regarding the dog leading the police to the house of accused no. 1 and accused no. 2.

5.7. PW 6 Dinesh Tribhuvandas Sheth Exh. 28 is the panch, who had witnessed the inquest on the dead body. Similarly the prosecution has also placed reliance on the evidence of PW 7 - Umedbhai Dhanrajbhai Exh. 30. It has also examined PW 12 - Jitendrasinh Gambhirsinh Jetwa at Exh. 43 for discovery of knife and also the panchas of the panchnama of the arrest of accused no. 1. PW 17 - Bedidan Kishandan Charan Investigating Officer has been examined at Exh. 60. He has described in detail the course of investigation and has stated that accused no. 1 was apprehended one month and six days after the incident. In the cross-examination of this witness, nothing of any importance from the point of view of the defence has been elicited. Another Police Officer

has been examined by the prosecution with regard to apprehending accused no. 1 as well as accused no. 2.

6. The aforesaid evidence conclusively proves certain facts which can be termed as circumstances involving accused no. 1 in the case.

6.1. First of all PW 5 had deserted accused no. 2 and accused no. 1 and his other brothers and he was staying with PW 1 and their two children, namely Kinjal and the deceased. He hardly visited the accused since the time he started staying with PW 1, Sarojben. It is further clear from the evidence that on account of this, the relations between accused and PW 1 and her children were not cordial. In fact it appears that accused no. 2 and PW 1 had never met. Accused no. 1 sometimes used to visit PW 1 but he always talked with PW 5 and hardly paid any attention to PW 1 or her children. It is also clear that accused no. 1 on the day previous to the incident had met PW 5 and had demanded money for purchase of 10 to 12 pairs of white shoes for doing some business, which request was turned down by PW 5. He had also not acceded to the demand of accused no. 1 with regard to giving a shop to him saying that it was meant for Keyur. This was not liked by the accused no. 1. It is, therefore, very natural that such approach of PW 5 would certainly agitate accused no. 1 and to some extent it may turn him against the children of PW 1 and in particular Keyur. It is further in the evidence that in the afternoon for about 2 to 3 hours Keyur would be all alone in the house.

6.2. There is no direct evidence as to what happened inside the house. However, the prosecution has been successful enough to produce evidence with regard to the blood stained clothes of accused no. 1 which he is stated to have put on at the time of the incident and which were tried to be washed by accused no. 2 with a view to destroy the evidence regarding involvement of accused no. 1 in the crime. This fact has been proved by evidence of PW 16 Mahesh Chunibhai Vadgama Exh. 82, who had acted as panch at the time of drawing recovery panchnama of the blood stained clothes.

6.3. Merely because the panch has not supported, discovery cannot be thrown overboard because as per the Apex Court, the contents thereof can be relied on if the panchnama is exhibited and the Investigating Officer deposes with regard to contents of the panchnama which is written in his presence.

6.4. Though the next circumstance is not relevant in the eye of law and it is considered to be weak piece of evidence i.e. the dog tracking, but in the instant case it had led the police upto the house of the accused no. 1. Later on from this very house certain incriminating evidence has been found by the investigating agency upon the arrest of accused no. 2. The clothes of accused no. 1 which were washed by her and detection of some blood stained fabric from the bathroom.

6.5. The accused no. 1 himself had suffered certain injuries and in all probabilities it was on account of making his escape good from the scene of offence he had received these injuries. The evidence found from the bathroom confirms the fact that accused no. 1 himself had some bleeding injuries. The prosecution has duly proved the fact regarding injury to accused no. 1 by Exhs. 77 and 78.

6.6. After the incident accused no. 1 was not to be found and later on it transpired that he had run away to Bombay while he was absconding and had done some job at three places.

7. Thus, considering the aforesaid circumstances, we are of the opinion that the prosecution has not only successfully proved each of the aforesaid circumstances individually but the chain formed by such evidence is complete. It conclusively proves the guilt of accused no. 1. We, therefore, do not find any discrepancy in the case of the prosecution and we are in the agreement with the ultimate conclusion drawn by the trial Court with regard to guilt of accused no. 1. In other words, in our opinion the prosecution has successfully established and conclusively proved that the chain of circumstantial evidence is not only complete but it unerringly points to the guilt of accused no. 1. In that view of the matter, we see no merit in this appeal and we dismiss it.

8. We may now turn our attention to the appeal filed by the State of Gujarat challenging the order of the acquittal passed in favour of accused no. 2. We have discussed the state of evidence above. There is no evidence against her except the fact that accused no. 2 had pointed out the blood stained clothes of accused no. 1 and the knife. In our opinion these circumstances cannot be enough to conclusively prove accused no. 2 guilty of the offence alleged against her. In that view of the matter, the appeal of the State has

also no merit and it is ordered to be dismissed.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.